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In the Supreme Court of the United States

Susan Tave Zelman, Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

Doris Simmons-Harris, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE*

Ohio School Boards Association, Ohio Association of School Business Officials, Buckeye Association of School Administrators, Ohio Coalition for Equity and Adequacy of School Funding, Coalition of Rural and Appalachian Schools, Ohio Association of Secondary School Administrators

IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* OHIO SCHOOL ASSOCIATIONS

This appearance today as *amici curiae* is made by six Ohio school associations representing a broad range of interests within Ohio's K-12 educational community.[1] These organizations are: (1) the Ohio School Boards Association, a nonprofit corporation representing over 700 Ohio school districts and related educational entities; (2) the Ohio Association of School Business Officials, a nonprofit corporation representing over 950 school district treasurers, business managers, and other officials involved in the management of school operations; (3) the Buckeye Association of School Administrators, a nonprofit corporation representing over 850 school district superintendents and administrators throughout Ohio; (4) the Ohio Coalition for Equity and Adequacy of School Funding, a governmental consortium representing over 500 of Ohio's public school districts which has successfully challenged the constitutionality of Ohio's system of school funding, *see DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) ("*DeRolph I*"), and which continues to represent such districts in seeking the effectuation of a legal remedy; (5) the Coalition of Rural and Appalachian Schools, a governmental consortium which represents school districts in 34 Ohio counties located primarily in southern and eastern Ohio and which has a special cooperative relationship with Ohio University College of Education in Athens, Ohio; and (6) the Ohio Association of Secondary School Administrators, a nonprofit corporation

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[1] Counsel for the *amici* authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk.

which represents over 2400 middle school level and senior high school principals and other administrators in all of Ohio's 88 counties.

These Ohio school associations enter this appearance for the purpose of providing the Court with certain Ohio-specific information which may not be as readily accessible to the parties and other *amici* in this case of such intense national interest, and also to impart their unique perspective on the issues based on their collective experience as Ohio educators.

SUMMARY OF ARGUMENT

Although this brief is submitted in support of respondents, we begin by identifying two significant aspects of the controversy with regard to which these *amici* agree with petitioners. First, we agree that there is a "profound educational crisis" engulfing Cleveland's public schools. And second, we agree that Cleveland's children are entitled to something better, and we support petitioners' implicit suggestion that the inferior educational opportunities afforded Cleveland's poor and primarily minority students raise issues of federal constitutional magnitude. Where we part company with petitioners is in their advancement of publicly-funded religious education as a remedy for this crisis. According to the Ohio Supreme Court, the State of Ohio has neglected the command of the Ohio Constitution that the state ensure the provision of an adequate education to *every* public school student throughout the state; if any school district falls short of the constitutional standard, the state must remedy it. *DeRolph I*, 677 N.E.2d 733. Yet, rather than remedy its failing schools, the state here flaunts the crisis in public education for which it is responsible, seeking to advance that crisis as justification for a voucher program dominated by religious institutions.

But in addition to their educational entitlement under the Ohio Constitution, Cleveland's children also have a constitutionally protected right to free exercise of religion, and they cannot be required to sacrifice the latter in order to obtain the former. The choice the state offers Cleveland's poor and desperate families– an unsafe and academically inadequate education at a secular public school or a safe and adequate education in a voucher program dominated by private religious schools– is unconstitutional, and families that respond by enrolling their children in religious schools through the voucher program cannot be said to have freely chosen the resulting religious indoctrination of their children, especially given undisputed data indicating that the overwhelming majority of voucher students attend schools that inculcate a faith different from the students' own. The consequent diversion of public schoolchildren and public dollars to private religious institutions can only be attributed to state action and not to genuinely independent private choice, in violation of both the Free Exercise and the Establishment Clauses of the First Amendment to the United States Constitution.

Families that remain in Cleveland's public schools also pay a heavy price: their children avoid religious indoctrination but endure an education the state characterizes as not even "minimally adequate." Meanwhile, in some public schools elsewhere in Ohio, students are afforded a constitutionally adequate education without being required to compromise their religious convictions. No rational basis, let alone compelling interest, justifies this disparate treatment of Ohio's children.

Finally, an accurate assessment of the origins and nature of Ohio's voucher program is critical to an assessment of its constitutionality. While petitioners emphasize the overwhelming failures of the Cleveland public schools as

justification for the voucher program, they also inconsistently and misleadingly argue that the program exists in the context of a multitude of other educational options. It does not. As petitioners have maintained from the beginning, the voucher program is a lifeline offered to families otherwise trapped in Cleveland's failing public schools. No lifeline would be needed if adequate alternatives were truly available, and they are not. As for the nature of the voucher program, it was, from the start, "designed in a manner calculated to attract religious institutions," *Simmons-Harris v. Zelman*, 234 F.3d 945, 961 (6th Cir. 2000), and it in fact screens out public (non-religious) schools through financial disincentives. As a result, the voucher schools are today almost uniformly religious.

ARGUMENT

I. THE STATE IS RESPONSIBLE FOR THE CRISIS IN CLEVELAND'S PUBLIC SCHOOLS, AND THE STATE'S ESTABLISHMENT OF AN OVERWHELMINGLY RELIGIOUS VOUCHER PROGRAM IN RESPONSE TO THAT CRISIS IS UNCONSTITUTIONAL.

Throughout the history of this litigation, petitioners have premised their defense of the voucher program on the overwhelming failure of public education in Cleveland. The State Petitioners assert that in the mid-1990s, the Cleveland schools were "engulfed in a profound educational crisis." Brief of State Petitioners at 18, *Zelman v. Simmons-Harris*, __ U.S. __ (*cert. granted* 2001) (Nos. 00-1751. 00-1777, 00-1779). "By almost any measure - test scores, graduation rates, student discipline, judicial intervention, and financial

stability– objective assessments of the Cleveland schools' performance led to the same conclusion: a child's prospect for receiving a decent education from Cleveland's public schools was dismal." *Id.* Cleveland "was mired in a 'financial crisis that is perhaps unprecedented in the history of American education.' The crisis had reached such proportions that it prevented the district from providing even a minimally adequate education for its students." *Id.* at 2-3 (citation omitted). Moreover, as the Senel Taylor Petitioners observe, the crisis in Cleveland's schools is not abating:

> The educational crisis is severe and continuing. In 1999, the State of Ohio reported that CCSD [Cleveland City School District] failed to meet a single one of the 18 performance criteria set by the State. Among students taking ninth grade proficiency tests, only 11.6 percent of CCSD students passed, compared to 55.6 percent statewide and 22.4 percent of students in districts of similar size, poverty, geography, and tax wealth. The following year, in which expanded performance criteria were used, CCSD met zero out of 27 standards. The graduation rate for CCSD students in 1996 was an appalling 39.3 percent; by 1998 it had fallen to 32.6 percent.

Id. at 26 (citations omitted).

One cannot but be moved by the plight of the children trapped in this system, and any program that enables some to escape has undeniable appeal. But the State of Ohio, with its voucher program, is no benign rescuer of the children, and the voucher program is not a neutral "choice" program. Rather, the state is itself the agent of educational neglect,

having been entrusted by the Ohio Constitution with responsibility for the very public education system it here condemns, and the voucher program insidiously– and unconstitutionally– imposes religious indoctrination upon students whose families are willing to see them rescued even on these terms.

Over four years ago, the Ohio Supreme Court addressed the issue of educational deprivation in Ohio and found the state's system for funding public education unconstitutional; the state had failed to ensure that public schoolchildren throughout Ohio were safely and adequately educated. *DeRolph I*, 677 N.E.2d 733.[2] In the intervening years, as legal attempts to obtain a remedy have continued, unconstitutional deprivation of schoolchildren has remained a hallmark of public education in Ohio. The crisis in the Cleveland schools is particularly acute, as petitioners have argued to this Court.

It is in this context of an educational crisis created and perpetuated by the state that the voucher program must be judged. *All* of Cleveland's 78,000 (K-12) public school students are entitled by virtue of the Ohio constitution to receive *from the state's system of public schools* all of the secular benefits the voucher schools are said to confer. But

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[2] Three years later, finding the funding system "almost identical to its predecessor," the court again declared the system to be unconstitutional, *DeRolph v. State*, 728 N.E.2d 993, 1006 (Ohio 2000) ("*DeRolph II*"), and in September, 2001, the court ordered specific increases in state funding for Ohio's schools, *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001) ("*DeRolph III*"). But the court subsequently granted the state's motion for reconsideration, *DeRolph v. State*, 757 N.E.2d 381, (2001), stayed *DeRolph III*, and ordered the parties to mediation, *DeRolph v. State*, 93 Ohio St.3d 628, - N.E.2d -, 2001 WL 1539131 (Ohio, Nov 16, 2001) (No. 99-570, 121367), which at the time of this writing, has yet to begin.

for the state's unconstitutional neglect of public education, there would be no need for a voucher program; but for the voucher program, public funds and public school students would not be diverted to religious schools.

II. A STATE-FUNDED PROGRAM THAT PROMOTES RELIGIOUS EDUCATION AS AN ALTERNATIVE TO DANGEROUS, INEFFECTIVE, AND UNCONSTITUTIONAL PUBLIC SCHOOLS VIOLATES THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT AND IS A DENIAL OF EQUAL PROTECTION.

The state's implicit acknowledgment, in the context of this case, that the state has failed to produce a system of public schools compliant with the mandates of the Ohio Constitution requires the state to provide such schools. To the extent that the voucher program offers an alternative to the state-created crisis in the public schools, it does so at an impermissible cost to rights guaranteed by the First Amendment to the United States Constitution.

A. The voucher program coerces enrollment in religious schools as the price of obtaining a safe and effective education, in violation of the Free Exercise and Establishment Clauses.

The critical shortcomings of the Cleveland schools and the lack of adequate non-religious alternatives outside the voucher program create a scenario in which families are unable to freely and independently choose to send their

children to religious schools. A program that offers fearful and hopeless families the opportunity to escape a failed public school system by enrolling their children in religious schools is inherently coercive and burdensome of the First Amendment right to freely exercise one's own religion – or to abstain from the exercise of religion altogether. *See Lee v. Weisman*, 505 U.S. 577, 621 (1992) (Souter, J., concurring) ("[L]aws that coerce nonadherents to 'support or participate in any religion or its exercise,' would virtually by definition violate their right to religious free exercise." [citations omitted]).

1. Voucher families do not freely and independently choose religious education for their children.

The goals and characteristics of the voucher families plainly contradict the contention that voucher families genuinely exercise free choice when they enroll their children in religious schools. In terms of socio-economic characteristics, voucher families are vulnerable, lacking financial resources to access, on their own, alternatives to the failed public schools, and yet particularly susceptible to the harms inflicted by those schools.[3] Not surprisingly, two studies commissioned by the state determined that voucher

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[3] *See, e.g.*, Brief of State Petitioners at 6, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) ("Scholarship [voucher] recipients are predominantly low-income minority children from families headed by a single mother. Indeed, 70 percent of the households of scholarship students are headed by a single mother, and the mean income of those families is $18,750. These socioeconomic characteristics suggest that these children are more likely to suffer academic setbacks than the average student." [citations omitted]).

families are drawn to the program not for the religious training their children consequently receive but for the secular benefits the program offers– most notably, educational quality and safety. *See* Brief of State Petitioners at 11, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (citations omitted). The voices of the parents are chilling:

> I attended public school in the Cleveland Public School District and my current disability is related to the unsafe conditions to which I was exposed in the Cleveland public schools. I want to ensure that my daughter is not exposed to the same unsafe conditions.

See Brief of Petitioners Hanna Perkins School at 27-28, *Hanna Perkins School* (No. 00-1777) (comment by parent, Dawn Call, whose child is enrolled at Westpark Lutheran School).

> At the public schools my child often complained that there was no toilet paper or hand soap in the restrooms. In some of the classrooms there were buckets to catch water dripping from the ceiling. The classes were overcrowded. He is receiving a much better education in math and reading than he did at the public school.

Id. at 30 (comment by parent, Regena Hunter, whose child is enrolled at St. Francis School).

> If the Scholarship Program is ended and I am unable to raise the necessary financial resources, I will likely home-school Byron. Going back to a Cleveland Public School would destroy all the good things that have been accomplished during the past three years. Not only will his academic progress be

stunted, I would fear for the safety of my son.

Id. at 32-33 (comment by parent, Angela Grandberry, whose child is enrolled at Luther Memorial School). That any parent would feel compelled to turn to a religious school, using state funding, because his or her child would be unsafe and lacking basic necessities in a public school is an outrage, and it is violative of both the Ohio and the federal constitutions.

The state's contention that "any indoctrination that occurs in religious schools is attributable to parental choice, not governmental action," Brief of State Petitioners at 16, *Zelman* (Nos. 00-1751, 00-1777, 00-1779), is patently unbelievable, especially given the overwhelming dissimilarity between the religious affiliations of the families and the voucher schools to which they send their children.[4] Voucher parents tell us they are choosing *physical safety* and *effective educational programs* for their children; they do not tell us they are deliberately choosing religious indoctrination. The fact that the benefits sought by these families are not otherwise available to them distinguishes the voucher program from the remedial instruction approved in *Agostini v. Felton,* 521 U.S. 203, 232 (1997) ("The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school, 20 U.S.C. § 6312(c)(1)(F)§§. *The Board's program does not, therefore, give aid recipients any incentive to modify their*

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[4] *See, e.g.*, Brief of State Petitioners at fn.3, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) ("Sixty-two percent of the [voucher] scholarship students enrolled in the registered Catholic schools are not of the Catholic faith"). And even families that share the faith of the voucher school to which they send their children may have been unconstitutionally influenced by the state to do so, since they, too, might prefer an adequate, secular, public school if that option were available to them.

religious beliefs or practices in order to obtain those services." [emphasis added]).

The voucher families' expressions of gratitude for the "lifeline" offered them by the program does not negate the fact that their acceptance of the lifeline is the product of state coercion nor does it alter the legal analysis. When petitioners deny the coercive effect of the voucher program, arguing the absence of financial or social incentive, they disingenuously close their eyes to the desperation created by the intolerable conditions in the public schools. The mantra of "free choice" rings hollow when the alternative is "a school system beset by virtually every conceivable problem, from poor academics to administrative problems to chronic violence." Brief of Petitioners Senel Taylor at fn. 26, *Senel Taylor v. Simmons-Harris*, ___ U.S. ___ (*cert. granted* 2001) (No. 00-1779).

2. The constitution is offended when one constitutional right (adequate education) is conditioned upon the surrender of another (free exercise of religion).

The doctrine of unconstitutional conditions prohibits the government from conditioning even a discretionary benefit (one the government has no obligation to confer) upon the surrender of a constitutional right.[5] In a long line of cases,

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[5] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1988) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power

the Court has applied this principle to strike down conditions, attached to discretionary benefits, that burden the free exercise of religion:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 716-18 (1981).

Ohio's voucher program is especially repugnant to the Constitution because it effectively conditions not a discretionary benefit but a state constitutional entitlement– adequate education– upon the waiver of the right to free exercise of religion. This Court has frequently and forcefully articulated the right of schoolchildren to be free of religious coercion in the school setting. *See, e.g., People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 231 (1948).

The Court has never wavered from this position. Considering the issue of school-sponsored prayer exercises at a graduation ceremony in *Lee*, 505 U.S. at 596, the Court admonished that "[i]t is a tenet of the First Amendment that the state cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." As here, the challenged

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to impose a condition on its receipt").

practice was defended on the basis of its importance, a defense the Court viewed as ironic and categorically rejected:

> The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail.... We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation.

Id. at 595. Responding to the claim that attendance at *Lee*'s graduation ceremony was voluntary- the analogue of the instant petitioners' claim that the voucher program is a matter of "choice"- the Court concluded "[t]he argument lacks all persuasion. Law reaches past formalism....[T]he fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise." *Id.* at 595-96.

Two terms ago, the Court extended *Lee's* analysis to high school football games. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). Again an argument was advanced that attendance was voluntary, and again the Court rejected the argument.

> To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme."
>
> . . .The constitutional command will not permit the District "to exact religious conformity from a student as the price" of

> joining her classmates at a varsity football game.

Id. at 311-12 (citations omitted).

If the state cannot exact religious conformity as the price of attending high school graduation ceremonies or a varsity football game, how much greater is the affront to the Constitution when such conformance is exacted in exchange for a safe and adequate education? Beyond question, the harm to those involved and the constitutional infirmity are incalculably greater here than they were in *Lee* and *Santa Fe*. A student's desire to attend graduation ceremonies or a high school football game, however strongly held, pales in comparison to the fundamental imperative (and state constitutional right) to be adequately educated in a safe environment. Moreover, whereas students in *Lee* and *Santa Fe* were at most compelled to sit through a religious invocation (in *Santa Fe*, there was only the threat of such an event), the proselytizing to which students must submit at many of the religious schools in issue here is omnipresent and essentially inescapable for this "captive audience."[6]

The trade-off the voucher program demands is more than just profoundly troubling. It is unconstitutional. The state can no more condition a Cleveland student's receipt of a constitutionally-adequate education on submission to religious indoctrination than it could routinely subject prisoners to unconstitutional conditions of confinement in state-operated prisons, offering the option to transfer to superior prison facilities operated by a religious order and infused with religious practice.

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[6] *See Simmons-Harris*, 234 F.3d at 949 ("The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects").

When the state coerces families into "choosing" a religious education for their children, the consequent flow of public funds and otherwise public schoolchildren to religious institutions violates the Establishment as well as the Free Exercise Clauses, coercion alone being sufficient– although not necessary– to support an Establishment Clause challenge. *Lee*, 505 U.S. at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion").

Finally, there can be no serious argument that any legitimate state interest is served when the state influences voucher families to "choose" private religious education over a public one that fails to meet constitutional standards. The only interest the state constitutionally may seek to advance in these circumstances is the one ordered by the state courts: reform of the system so that every public school student is assured a constitutionally-adequate education.[7]

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[7] Whether the state could operate its voucher program in tandem with a system of constitutionally-adequate public schools is a hypothetical question that need not be addressed in the context of this litigation, and it is one that is unlikely ever to arise in Ohio. The voucher program exists as a response to the failing public school system; once the state remedies the public system, the *raison d'être* for the voucher program will no longer exist.

B. The Establishment Clause is also violated by the voucher program's lack of secular purpose, as evidenced by the fact that religious domination was an intended and foreseeable feature of the program from the start.

Petitioners misunderstand the legal consequences of the state's conduct when they argue that "'[t]he critical issue is not whether children go to private or public schools, to religious or nonsectarian schools, but whether they go to good schools or bad schools.'" Brief of Petitioners Senel Taylor at 28-29, *Taylor* (No. 00-1779) (quoting Dr. Howard Fuller). When the government rejects purely secular means of accomplishing an otherwise legitimate purpose in favor of means that clearly aid religion, the chosen means cannot be said to serve a secular purpose. *See Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) ("The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests").

Here, however, there is something more at work than a neutrally-designed program that just happens to result in massive public aid to religious institutions. An examination of the statutory framework of the program and the circumstances surrounding its enactment reveal that the religious effects of the program were intended from the start.

1. The statutory framework of the program favors religious schools.

As an initial matter, it is absolutely essential to recognize the extent to which the Ohio voucher program is dominated by religious schools. Petitioners may make grand allusions to a "range of options," but the facts are clear: a student seeking a secular education will be hard-pressed to find it in this program. Only 10 of the 56 schools participating in the voucher program during the 1999-2000 school year were described as non-religious, *Simmons-Harris*, 234 F.3d at 949, and it appears that today, there may be as few as *four* non-religious schools among the 50 in the program.[8] Of these few remaining secular schools, three serve children in pre-kindergarten and kindergarten only. The Hannah Perkins School, an intervenor petitioner in the instant case, offers pre-kindergarten and kindergarten for children with emotional problems, *Member Institutions: Hanna Perkins School,* All About University Circle, *available at* http://www.universitycircle.org/members/hanna/htm (last visited Nov. 21, 2001), and it serves only 21 students according to the National Center for Education Statistics. *Find Your School,* NCES Education Information for Students Across the Nation, *available at* http://www.nces.ed.gov (last visited Dec. 4, 2001). Covenant Kindergarten, with slightly more than one teacher (1.1), serves 53 students in pre-kindergarten and kindergarten. *Id.* Lewis Little Folks school serves only 17 students in pre-kindergarten and kindergarten, *id.*; furthermore, because it is a federally sponsored child care

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[8] *See* Study, Piet van Lier & Caitlin Scott, *Fewer Choices, Longer Commutes for Black Voucher Students*, Catalyst for Cleveland Schools, *available at* http://www.catalyst-cleveland.org/10-01/1001extra4.htm (Oct./Nov. 2001).

center, it is required to give priority to the children of federal employees, and such children must comprise at least 50% of the enrollees, *Federally Sponsored Child Care Centers*, United States Office of Personnel Management, *available at* http://www1.opm.gov/wrkfam/html/cchb508.html (last visited Dec. 5, 2001). Given these known limitations, it appears that a Cleveland parent seeking a secular school that provides education beyond the kindergarten year may have very few schools– and perhaps only one school– from which to choose.

The overwhelming presence of religious schools in the voucher program is not mere happenstance; it reflects, first, the lower costs associated with parochial schools together with the special ability of these schools to augment through other funding sources the otherwise-insufficient vouchers provided by the state. *Simmons-Harris*, 234 F.3d at 959. Second, the near-complete dominance of religious schools is a function of the voucher program's strong financial disincentives to participation by *public* school districts adjacent to the Cleveland schools. Perhaps the most striking errors these Ohio school *amici* have observed in the various briefs filed in support of the voucher program are the misstatements relating to Ohio's methodology for funding its public schools and, in particular, the amount of state funding actually received by the individual public districts adjacent to the Cleveland Municipal School District. (These are the public school systems which *could* participate in the voucher plan, but do not. *See* Ohio Revised Code ["R.C."] 3313.974[G]).

The following table lists the total per pupil expenditures for each of the adjacent districts, together with

an amount representing the state's share of those expenditures for the 1999-2000 school year:[9]

Adjacent District (Public)	Total Per Pupil Expenditures	State Funding Per Pupil
1 Berea City SD	$8,283	$1,452
2 Brooklyn City SD	$8,462	$1,245
3 Cleveland Hts-Univ Hts City SD	$10,803	$3,177
4 Cuyahoga Heights Local SD	$14,572	$1,385
5 East Cleveland City SD	$9,306	$5,936
6 Euclid City SD	$8,194	$2,410
7 Fairview Park City SD	$8,509	$2,072
8 Garfield Heights City SD	$7,546	$2,758
9 Lakewood City SD	$8,633	$3,081
10 Maple Heights City SD	$7,175	$3,181
11 Parma City SD	$7,250	$1,861
12 Rocky River City SD	$8,823	$1,401
13 Shaker Heights City SD	$11,604	$2,548
14 South Euclid-Lyndhurst City SD	$9,001	$1,947
15 Warrensville Heights City SD	$9,279	$3,774
(Average)	**$9,163**	**$2,548**

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[9] Data from *ODE Local Report Card*, Ohio Department of Education (2001), *available at* http://www.ode.state.oh.us/reportcard01/lrc.htm (last visited Dec. 10, 2001).

Comparing the low voucher amount ($2,250) with the per-pupil expenditures of the public schools adjacent to the Cleveland schools, it is evident that the adjacent districts simply cannot afford to participate in the voucher program. A participating adjacent district would receive, on account of each enrolling voucher student, two amounts: the voucher, plus the per-pupil funding provided to the district by the state – the latter generally amounting to only a fraction of the district's per-pupil costs. In the adjacent district of Rocky River, for example, the state's share is only $1,401, meaning this district would receive at most $3,651 ($2,250 plus $1,401) if it enrolled a voucher student– far short of the $8,823 necessary to educate each student in the Rocky River district. In essence, petitioners expect the adjacent districts to accept from voucher students an amount far less than is necessary to educate the voucher student *in that district,* and petitioners are then mystified that this proposal is declined.[10]

The same phenomenon described above can also be demonstrated by looking at the official tuition rates of the adjacent public districts. The official tuition rate is the

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[10] Petitioners have repeatedly misrepresented the operation of the voucher program with respect to the adjacent districts. *See* Brief of State Petitioners at fn.2, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (public district might get "as much as $6,544" from state); *see also,* Brief of Petitioners Senel Taylor at 39, *Taylor* (No. 00-1779) ("$6,544"); Brief of Petitioners Hannah Perkins School at 23, *Hanna Perkins School* (No. 00-1777) ("6,750 provided by the State"). These grossly erroneous figures appear to rest on a false assumption that the state pays the *total* "base cost" amount (R.C. 3317.012) to school districts each year for every student enrolled. In fact, the "base cost" or "formula" amount– which represents the hypothetical cost of an adequate education– is a combination of *state and local funds*. The portion of this "base cost" figure paid by the state is highly variable, depending on the property tax wealth of the district. (*See* R.C. 3317.022.)

amount which an Ohio school district is *required by law* to charge non-resident students which it admits to its schools. *See* R.C. 3327.06. It represents the local tax component of educational costs– that is, the amount that must be added to state funds to pay the total cost of educating one child in that district. The *average* of the official tuition rates for the fifteen adjacent public school districts is $6,761/year[11]; and in every district but one– the East Cleveland City School District– the voucher amount is far less than the district would ordinarily be required to charge for an out-of-district student. Indeed, in all the districts but two, the voucher amount is *less than half* of the regular tuition rate.[12]

2. The history of the enactment reveals that advancement of religion was an intended consequence of the voucher program.

This Court has recognized that while the text of a challenged enactment may be the starting point for Establishment Clause analysis, it is not the end of that

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[11] Data at *Pupil Tuition Report*, State of Ohio Department of Education - Division of School Finance (Fiscal Year 1999-2000), *available at* http://www.ode.state.oh.us/sf/foundation/reports/F2000-T40256.HTM (last visited Dec. 10, 2001).

[12] It should be noted that the East Cleveland City School District, like the Cleveland district itself, is categorized by the state as an "academic emergency" district. *See East Cleveland City School District, Cuyahoga County*, State of Ohio - 2001 District School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/043901.pdf (last visited Dec. 11, 2001).

analysis. "Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts....' [W]e refuse to turn a blind eye to the context in which this policy arose...." *Santa Fe*, 530 U.S. at 315.

The context in which Ohio's voucher program arose is telling. Certainly, the financial disincentives to participation by secular private and adjacent public schools were foreseeable at the time of the program's enactment. Furthermore, there is considerable evidence that the program was motivated by an intent to aid parochial schools and to fulfill certain political commitments of financial assistance previously made to these schools. *See* Doug Oplinger & Dennis J. Willard, *Voucher System Falls Far Short Of Goals*, Akron Beacon Journal (Dec. 14, 1999), *available at* http://www.ohio.com/bj/projects/whose_choice/docs/005374.htm#top (last visited Dec. 10, 2001).[13]

The context in which the voucher program was created additionally refutes petitioners' argument that the program sends no message of state endorsement of religion. The state has plainly and publicly posited the program it designed to favor religious schools as superior in quality to Cleveland's public schools. In these circumstances, it strains credulity to claim the state has not sent Cleveland's families a powerful message that the city's religious schools, and those who attend them, are preferred by the state. *See Santa Fe*, 530 U.S. at 308 ("The text and history of this policy, moreover, reinforce

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[13] Note, too, that like the aid struck down in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Ohio voucher program was enacted in the wake of precipitously declining enrollment in Catholic schools. *See* Brief of Petitioners Senel Taylor at fn. 8, *Taylor* (No. 00-1779) ("Between 1965-90, enrollment in Catholic schools nationwide decreased by 50%").

our objective student's perception that the prayer is, in actuality, encouraged by the school").

3. The "educational options" touted by petitioners as alternatives to the overwhelmingly religious voucher schools are legally irrelevant and, even if deemed relevant, are so limited as to be illusory.

All of the petitioners, to a greater or lesser degree, invite this Court to venture beyond the scope of issues presented by the Pilot Project Scholarship Program (the Ohio voucher plan) (R.C. 3313.974-3313.983) and to consider other Ohio programs which provide public funds to *non*-religious schools. Each of the petitioners, for example, suggests that the Court consider the impact of Ohio's community school legislation (Chapter 3314 of the Ohio Revised Code) when evaluating the constitutionality of the Ohio voucher program. This attempt to draw community (charter) schools into the analysis is understandable: standing alone, the voucher program presents a virtually monolithic religious presence (96% of the Cleveland voucher recipients are enrolled in religious schools).[14] *Simmons-Harris v. Zelman*, 72 F.Supp.2d 834 (Ohio 1999). For petitioners, adding non-religious community schools to the mix is absolutely essential in order to advance their central

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[14] Indeed, it appears the participation of non-religious schools in the Ohio voucher plan (always limited) is in fact dwindling. *See* fn. 8 *supra* and accompanying text.

argument– *i.e.*, that the parents holding vouchers are presented with a *true choice* between religious and non-religious institutions– with any plausibility whatsoever. Both the District Court and the Sixth Circuit wisely rejected what may be called petitioners' "Gestalt theory" of constitutional jurisprudence. *See Simmons-Harris*, 234 F.3d at 958. *Accord, Doe v. Beaumont Indep. School Dist.*, 240 F.3d 462, 484 (5th Cir. 2001) ("Like the [Cleveland] voucher program, Clergy in Schools is a free-standing program, which must therefore be tested *independently*").

No compelling reason has been advanced for considering the community school program (R.C. Chapter 3314) as an adjunct to the voucher plan (R.C. 3313.974-3313.983). The two are physically separate legislative enactments and functionally unrelated. Furthermore, it would be unseemly for this or any other court to allow the sins of one state program to be atoned for by good works of another. For example, would this Court seriously consider upholding a state law that restricted minority enrollment at certain state universities, if the state could also show that it had enacted substantial subsidies and scholarships that enhanced the *overall* educational opportunities for racial minorities? In the final analysis, such an approach simply cannot stand.

If, however, community schools are to be viewed as relevant in the present case, it then becomes necessary to focus for a moment on just what kind of "option" the community schools actually present for Cleveland parents. Charter schools in Ohio are known as "community schools" and are governed by Chapter 3314 of the Ohio Revised Code (enacted 1997). Community schools are organized as nonprofit corporations. R.C. 3314.03(A)(1). They must be nonsectarian in their programs, admission, policies, and operations. R.C. 3314.03(A)(11)(c). Community schools are funded by a deduction from the funding of each student's

"home" school district. R.C. 3314.08. Community schools are subject to the Ohio laws governing student discipline, health and safety, workers' compensation, employment compensation, student records, public records, and employment discrimination. *See* R.C. 3314.03. Otherwise, however, community schools are generally "exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents." R.C. 3314.04. Most significantly for present purposes, *community schools are not subject to any state minimum standards relating to the educational program and are exempt from all course of study and graduation requirements except their own. Compare* R.C. 3313.60 and 3313.61 *with* R.C. 3314.03(A)(11)(d), (f).

The record in the instant case reflects that there were just three community schools operating in the Cleveland Municipal School District during the 1998-99 school year: Old Brooklyn Montessori (1-4), Hope Chapelside Academy (K-8), and Hope Cathedral Academy (K-8). Affidavit of Steven M. Puckett at ¶12 (Jt. App. at 160a). During the 1999-2000 school year, seven other community schools were expected to be in operation. Puckett Aff. at ¶12 (Jt. App. at 160a-161a). Thus, petitioners argue that, at the time the record in this case was made, there were ten community schools in Cleveland serving as a "secular alternative" to the 46 "religiously affiliated" voucher schools. Brief of State Petitioners at 6, *Zelman* (Nos. 00-1751, 00-1777, 00-1779).

Although superficially appealing, this "secular alternative" touted by the petitioners quickly evaporates once the facts are examined. First of all, it must be remembered that students may enter the Cleveland voucher program only in grades K-3, R.C. 3313.975(C)(1); therefore, a community school offering higher grade levels is *not* an option for a parent considering the voucher program. This simple fact

means that two of the schools referenced in the record (Horizon Science and Life Skills) cannot be claimed as "secular options" to the voucher program. Of the remaining eight schools, two- the Cleveland Alternative Learning Academy and the International Preparatory Academy- present only a restricted option to Cleveland parents, since they are designated as "special population" schools.[15] Parents considering these schools might also be dissuaded by the lack of performance information on these schools. The Ohio Department of Education has indicated that it "currently does not create report cards for community schools that focus on students with special needs."[16] Of the six schools remaining, four are Hope Academies. Only two of these have been in existence long enough to have a state "Report Card" indicating the performance of students on the state proficiency tests. What do those "Report Cards" show? *Performance well below the Cleveland Municipal School District itself*, the failed school system from which voucher families seek escape. The following performance figures for the 4th-grade proficiency tests are taken directly from the school district "Report Cards" prepared and published by the Ohio Department of Education:[17]

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[15] *Performance Accountability 2001: Reporting on Community Schools*, Ohio Department of Education (2001), *available at* http://www.ode.state.oh.us/pa/toolkit_2001/community_schools.htm (last visited Dec. 10, 2001).

[16] *Id.*

[17] Scores may be found on the Report Cards for 1990-2000 (the "2001 Report Cards) posted on the Ohio Department of Education Web Site. *See Hope Academy Chapelside Campus (Grades K-7), Cuyahoga County*, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134197.pdf (last visited Dec. 11, 2001); *see also Hope Academy Cathedral Campus,*

Grade 4	State Perf. Std.	Cleveland District Average	Hope Chapel-side	Hope Cathe-dral
Citizenship	75%	41.4%	13.3%	10.3%
Math	75%	34.3%	3.3%	0.0%
Reading	75%	33.3%	13.3%	20.7%
Writing	75%	62.5%	23.3%	48.3%
Science	75%	30.1%	6.7%	3.4%
Passed All		**16.1%**	**3.2%**	**0.0%**

It is reasonable to assume that this abysmal performance by the students in these two Hope Academies would be duplicated in two other Hope Academies (Hope Broadway and Hope Lincoln Park) based upon the performance of these and other Hope academies elsewhere in Ohio.[18]

Cuyahoga County, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134205.pdf (last visited Dec. 11, 2001), and *Cleveland City School District, Cuyahoga County*, State of Ohio - 2001 District School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/043786.pdf (last visited Dec. 11, 2001).

[18] *See, e.g.*, officially posted results for Hope Academy University Campus in Akron (6.3% pass rate on 4th-grade math proficiency test, 0.0% pass rate on 6th-grade reading and science tests) and Hope Academy Brown Street Campus in Akron (4.2% pass rate on 4th-grade math and science tests and 0.0% pass rate on 6th-grade math and reading tests). *Hope Academy University Campus (Grades K-6), Summit County*, State of Ohio - 2001 Community School Report Card, *availableat* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134213.pdf (last visited Dec. 11, 2001); *see also Hope Academy Brown St. Campus (Grades K-6)*, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134221.pdf

In view of the above, it can be seen that of the original ten community schools named in the record, *only two* represent non-religious choices which are unfettered by the most obvious concerns of age-level eligibility, appropriateness, and quality of instruction. And of these two, only one (Old Brooklyn Montessori) has been in existence long enough (two and one-half years) to have "Report Card" data. As with most community schools, parents considering enrollment in the other remaining school (Citizens' Academy) have little objective information upon which to base a decision of very great importance to their child's development.

In conclusion, then, it is clear that the community schools available to parents within the Cleveland Municipal School District do not provide a "secular option" which is meaningful in the context of the present case. At the present time, these community schools (as a whole) are simply too new, too few, too ineffective, too unregulated, and too insubstantial to be anything other than a risky proposition for Cleveland parents who are seeking a non-religious alternative to the voucher schools.[19]

(last visited Dec. 11, 2001).

[19] Though hardly deserving of the Court's attention, some reference must be made here to petitioners' various arguments relating to "magnet" schools. These arguments are specious in the extreme. The term "magnet school" has no specific definition in Ohio law. Indeed, the phrase "magnet school" appears only once in the Ohio Revised Code, in a section enumerating program options for gifted students. R.C. 3324.07. Any district may create a "magnet" school simply by adopting a building-wide theme or curriculum designed to appeal to certain students. To say that the State of Ohio has created "magnet schools" as a distinct nonsectarian "alternative" is simply a false statement. "Magnet schools" are created in each instance as a local curricular decision. If petitioners want to inflate the number of nonsectarian "choices" available to Cleveland parents, they might as

C. The guarantee of Equal Protection is violated when the state establishes two tiers of schools in Cleveland– one religious and of high quality, the other non-religious and of poor quality– and when elsewhere in Ohio, the state affords public school students a high quality *secular* education.

The Senel Taylor petitioners write movingly of the "sacred promise of equal educational opportunities" set forth by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) . Brief of Petitioners Senel Taylor at 4-5, *Taylor* (No. 00-1779); *see generally id.* at 4-10. In their evident view of the case, the voucher program equals the playing field and serves as a life preserver for students otherwise condemned to failed public schools. *Id.* at fn.4; *see also id.* at 10.

The purpose of this Brief is not to oppose the rescue of Cleveland's public schoolchildren, but to challenge the constitutionality of the lifeboat sent by the state. In our view, petitioners pervert *Brown* when they use it to advance the cause of state-funded religious education for desperate students willing to endure it. Where is the concern for the remaining 78,000 students in Cleveland's public schools? We may not know how many students have eschewed the voucher program because of its religious burdens, but there are undoubtedly some, and the lack of certainty will not immunize the program. *See Santa Fe*, 530 U.S. at 316 ("Government efforts to endorse religion cannot evade

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well include *every building in the Cleveland district.* Ohio law requires public schools to have "open enrollment" *within* each district. O.R.C. 3313.97. Thus, *every* Cleveland school building represents a nonsectarian "option" under petitioners' analysis.

constitutional reproach based solely on the remote possibility that those attempts may fail"). Most importantly, if the goal truly is educational opportunity and not aid for religious institutions, why must the opportunities come with a religious price tag?

When *Brown* dismantled the notion of separate but equal half a century ago, the Court could not have envisioned that a state would today ask the Court's blessing upon separate and *unequal* schools, this time founded on religion. Yet the Court is now confronted with two tiers of state-supported education for Cleveland's children: superior schooling for those willing to accept it in a religious context, with others denied educational opportunity and exposed to physical risks in the bargain. Meanwhile, elsewhere in Ohio, children are afforded a high quality public education free of religious influence.

All of Ohio's 1.8 million public school children are the state's responsibility. *DeRolph I*, 677 N.E.2d 733. When the state deliberately provides its children with varying levels of educational opportunity, sometimes conditioned upon submission to religious indoctrination and sometimes not, the state denies equal protection of the laws, to the detriment of the schoolchildren of Cleveland.

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully urge the Court to uphold the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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